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IN THE

SUPREME COURT OF THE UNITED STATES

No. 524

MARK BARNETT COREY,

Petitioner,

vs.

DAVID E. HARTS, FLORENCE J. HARTS and PERCY E. JOHNSTON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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IN THE

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No. 524

MARK BARRETT COSBY,
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DAVID H. HARTS, FLORENCE J. HARTS and PERCY B. JOHNSTON,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Summary Statement of the Matter Involved.

The County Court of Logan County, Illinois on petition of the executor of the estate of May Barrett Chappelear having all necessary parties before it and having jurisdiction of the subject matter, ordered a sale to pay debts of the estate in accordance with the Illinois Statute.

Mark Barrett Cosby, Sr., sole heir and sole owner of the real estate (Finding 6 Pr. Rec. 415) entered his appearance in the proceeding to sell to pay debts. (Pr. Rec. 269-70).

There was an actual deficiency in the personal assets of May Barrett Chappelear estimated to be $14,932.70 (Pr. Rec. 260) and Mark Barrett Cosby, Sr. was fully

advised of the condition of the estate (Pr. Rec. 416, Par. 9).

The significant dates in the proceedings in the County Court of Logan County are:

Entry of Appearance of Mark Barrett Cosby, Sr. (Pr. Rec. 270)	May 19, 1938
Decree defaulting Mark Barrett Cosby, Sr. and ordering sale of the land described (Pr. Rec. 273)	June 6, 1938
Sale of defendant David H. Harts (Pr. Rec. 276)	July 2, 1938
Report of sale filed (Pr. Rec. 278)	July 6, 1938
Objections to sale filed by Mark Barrett Cosby, Sr. (Pr. Rec. 280)	July 16, 1938
Hearing on Report of sale, after fifteen days for filing objections, resulting in continuing same to Aug. 2, 1938 (Pr. Rec. 281)	July 18, 1938
Death of Mark Barrett Cosby, Sr.	July 21, 1938
Order of confirmation of Sale (Pr. Rec. 282)	Aug. 2, 1938

No attack has ever been made upon the decree for sale. The sale was necessary. All necessary parties were before the Court. None of the parties to this suit ever had a right to question the decree for sale.

As to the manner of conduct of the sale the District Court, supported by ample evidence, made the following conclusive finding.

"16

"The described land was fairly sold. The price at which it sold to David H. Harts was fair. Competent, timely and energetic effort was made on behalf of the estate to obtain the best possible price for the land by the executor and his representative, the auctioneer. *The defendant David H. Harts bid*

> *in good faith,* against the world, and paid for the land described *as a purchaser in good faith relying on the decrees of the Logan County Court.* David H. Harts thereby obtained whatever title to the described land was owned by May Barrett Chappelear at the time of his death." (Italics ours.) (Pr. Rec. 417.)

Petitioner, Mark Barrett Cosby, Jr., and his mother filed this suit in the District Court of the United States alleging that they were necessary parties to the proceedings in the Logan County Court at the time of entry of the order of confirmation of the sale.

The District Court of the United States withheld ruling on the defense that the suit was a collateral attack and heard the entire complaint on the merits, including the charges of fraud and conspiracy.

Petitioner who became 21 years of age November 23, 1943 (Pr. Rec. 72) and filed his complaint herein, May 22, 1944, was fully advised of his right to make a direct attack on the decree of the County Court of Logan County. The District Court found:

> "10.
>
> "The plaintiff, Mark Barrett Cosby, Jr., having full right to reopen the proceedings for sale in the County Court of Logan County, Illinois for all purposes and matters here urged by him, until November 1945, and that fact being urged in pleadings in this cause for more than one year, this Court should not act on his complaint to destroy the decrees of the said County Court" (Pr. Rec. 420).

Petitioner's rights are solely derivative from Mark Barrett Cosby, Sr. (Finding 7; Pr. Rec. 415).

The District Court, after full hearing, supported by ample evidence, found that the charges of fraud, conspiracy, hindering of bidders and inadequacy of price were

groundless (Pr. Rec. 247 and Findings 11, 12, 15, 16 and 17, Pr. Rec. 416, 417). The District Court said in part (Pr. Rec. 247):

> "The bill charges there was conspiracy, I think between Johnston and Harts, and there is no evidence upon which I can properly find that there was any conspiracy between them * * *. But the charge of fraud, inadequacy of consideration are not substantiated by the proof".

The Circuit Court of Appeals found that the record amply justified the findings of the District Court (Pr. Rec. 438).

Questions Presented.

The various "questions" stated by petitioner on pp. 7-8 of the petition all point to the question whether the petitioner has been deprived of property without due process of law.

The questions as presented in the petition are somewhat defective in that they ignore several important aspects of the case:

1. The law of Illinois offered petitioner an "opportunity to be heard" which he rejected.

2. Petitioner's right to an "opportunity to be heard" was satisfied by the full hearing and trial on the merits given by the District Court of the United States.

3. The unquestionably correct decree for sale entered with all necessary parties alive and before the court was followed exactly and a fair sale resulted.

The questions before this Court might therefore be more accurately stated:

1. Whether the judgment of the Circuit Court of Appeals affirming the judgment of the District Court that the County Court of Logan County, Illinois, having full jurisdiction of all necessary parties and of

the subject matter of a proceeding to sell real estate to pay the debts of the decedent, and having such jurisdiction at the time such matter first comes on for confirmation of the sale, all time for objecting thereto having expired, *cannot thereafter* so completely lose jurisdiction by reason of the death of the defendant so as to subject its subsequent order of confirmation to collateral attack by persons, who, prior to the death of such defendant were not proper parties, and had no right to be heard in the matter, in view of the settled law of Illinois that death of a defendant in such cases does not deprive the court of jurisdiction, there being no evidence whatever of fraud, constitutes a deprivation of property without due process of law or other denial of due process of law.

2. Whether the judgment of the Circuit Court of Appeals affirming the judgment of the District Court that a minor having, under the law of Illinois, the full right to reopen the sale proceedings in the County Court of Logan County, Illinois for all purposes and matters here urged by him until November 1945 and that fact having been urged in the pleadings in this cause for more than one year, was not entitled to have the District Court of the United States act on his complaint to destroy those decrees, constituted a deprivation of property without due process of law or other denial of due process of law.

3. Whether the petitioner having had his day in court, in the District Court of the United States on all issues which he could have presented anywhere, to-wit adequacy of sale price, fraud, and conspiracy and the United States District Court having decided all such issues against him can now be said to have been denied due process of law or to have been deprived of property without due process of law?

Reasons Relied on for Denial of the Writ.

The principle laid down by this court and followed in analogous cases is that jurisdiction of subject matter and necessary parties having once attached is not lost by subsequent irregularities so as to subject proceedings to collateral attack, and entry of a decree after death of a party where the matter was ripe for decision in his lifetime without bringing in additional parties is a mere irregularity.

The foregoing is the law of Illinois.

This petitioner declined to avail himself of the opportunity to be heard provided for minors by the law of Illinois.

This petitioner's opportunity to be heard has been satisfied by the full hearing on the merits given by the District Court of the United States and affirmed by the Circuit Court of Appeals.

Petitioner complains only of technical rights. The conclusive findings of fairness of sale show that no substantive rights are involved.

A purchaser in good faith at a judicial sale has a right not to be deprived of his property without due process of law.

Opinion of the Court Below.

The Opinion of the United States Circuit Court of Appeals for the 7th Circuit which respondents assert reaches an unquestionably correct result appears on pages 431 to 438 of the printed transcript of the record and is reported in 169 F. 2nd at pp. 689-694.

ARGUMENT.

Summary of Argument.

A.

The entry of the decree of confirmation of the sale by the County Court of Logan County after the death of Mark Barrett Cosby, Sr., the said Mark Barrett Cosby, Sr., having been alive at the time of decree for sale, during the sale, and until after time for filing objections had passed and having been alive at the time the sale first came on for confirmation, was a mere irregularity at most, and the only means provided for attack upon this irregularity is a direct attack. There was no "right" in this petitioner to be heard. This order being absolutely correct in the first instance would have to be entered if the proceedings were reopened. In such case an order *nunc pro tunc* would have been the proper procedure.

B.

In respect to the petitioner who was a minor the law of Illinois offered a full opportunity to reopen the proceedings in the County Court of Logan County until more than a year after the present suit was filed and this fact was urged on the petitioner by the pleadings in this suit.

C.

Petitioner's right to an opportunity to be heard was satisfied by the full trial given by the District Court of the United States.

Point A.

The decree of confirmation was within the jurisdiction of the County Court of Logan County, Illinois, should have been entered, and petitioner had no "right" to be heard thereon. It is therefore not subject to collateral attack in the absence of fraud. Failure to make petitioner a party at this stage of the proceeding was not a denial of due process of law and there has been no deprivation of property.

It should be made very clear in the beginning that the decree of the County Court of Logan County, Illinois, ordering the sale is valid and binding on all the world. This alone (as will be shown subsequently) **distinguishes this case from all cases cited by petitioner on the question of jurisdiction.**

The only person having any actual interest in the farm was Mark Barrett Cosby, Sr. This was decided in *Johnston* v. *Cosby*, 374 Ill. 407, which was a lawsuit to construe the will of May Barrett Chappelear to which the present petitioner was a party. It is absolutely immaterial that any persons including May Barrett Chappelear *thought* that others had interests in this land.

The petition to sell real estate to pay debts stated correctly that Mark Barrett Cosby, Sr. was the sole heir at law of the decedent May Barrett Chappelear.

The Illinois Statute.

The Illinois Statute makes complete and specific provisions for a proceeding to sell real estate to pay debts. Ill. Stat. (1937) Chapter 3, Paragraphs 100 to 111 inclusive and Paragraph 132. (See Appendix *Post*, pp. 29-31.)

The County Court is given plenary power to determine that land shall be sold and to settle all questions of title (Par. 102) and even to compel the filing of a petition to sell (Par. 132).

The heir must be made a party to the petition, but not the spouse of an heir (Par. 100).

On hearing the County Court may decree the sale of so much land as the Court considers it necessary to sell (Par. 108).

After the summons provided in Paragraph 103 no further notice is required by the Statute.

All sales are required to be made by the executor and such sale *bars heirs of the decedent and all persons* claiming by, through, or under them (Par. 109).

Full public notice is required for the sale, but no notice to the heir is required (Par. 110).

The sale must be reported to the Court within 10 days. The Statute does not require notice to the heir of the sale at the time of filing the report of sale (Par. 110).

Any person interested may object to confirmation of the sale within fifteen days of the sale (Par. 110). The heir has only the same privilege of objection, as others interested, the same privilege that creditors have. As an heir he is completely divested of title by the decree of sale.

There is no authority to extend the time for filing objections beyond fifteen days from the sale.

The Court on hearing the report, "May approve and confirm the sale, or disapprove the same and order the premises resold" (Par. 110). The proceeds of sale are money assets of the estate the same as proceeds of sale of personal property (Par. 111).

The Status of the Proceedings on July 21, 1938 when the Heir, Mark Barrett Cosby, Sr., Died.

In this case there was only one necessary party defendant, Mark Barrett Cosby, Sr. *Johnston* v. *Cosby*, 374 Ill. 407, held he was the sole heir. He was of sound mind (Finding 20, Pr. Rec. 418). He had entered his full appearance (Pr. Rec. 269-70).

The decree for sale was entered June 6, 1938. The sale was held July 2, 1938. The report of sale was made July 6, 1938. The objections were filed by Mark Barrett Cosby, Sr., on July 16, 1938. The time for objection by anyone expired fifteen days after the sale, July 17, 1938. On July 18, 1938, the report came on for hearing and the objections of Cosby were set for August 2, 1938.

This case is unlike the cases cited by petitioner for four reasons: *First*, all necessary parties were alive and before the Court; *Second*, every step had been taken in accordance with the decree of sale; *Third*, the decree of sale was in full force and effect, and *Fourth*, the time for every objection had passed and there remained only the action of the Court to approve or to disapprove.

By the decree of June 6, 1938, Mark Barrett Cosby, Sr., was divested of title to the land to be sold. The transaction of sale was thence forward between the Court as vendor and the purchaser sought or secured. The Court offers the land for sale and deals with the purchaser.

At this stage Mark Barrett Cosby, Sr., had no right in this land that was inheritable. He with creditors had a mere privilege of objection, the statutory privilege to make representations to the Court and to complain of a clear abuse of discretion by the court. The sale was

completely subject to that discretionary power of the Court.

Fifteen days after the sale having expired no one had a further statutory right to file objections.

On July 18, 1938 when the report came on for hearing Mark Barrett Cosby, Sr., was living and the *County Court had jurisdiction to confirm.* The Court set the report for future hearing. The case was ready for decision. The Court was endowed with the largest discretionary power to act to the interests of the Chappelear estate, its creditors, the lienholder, and the rights of the purchaser.

On August 2, 1938, the Logan County Court had the duty to pass promptly on the sale to David H. Harts. No other party than the court and David H. Harts was necessary. The discretion to be exercised in passing on the sale was the discretion of the court and no other. To attack on appeal, the decision reached by the exercise of that discretion, it would be necessary to establish positively that a substantially better result would be obtained by rejecting the sale and that the Court abused its discretion in approving the original sale.

The contention that between July 21, 1938 after all time for filing of objections had passed and August 2, 1938 the hearing on the report, either plaintiff in this case became a necessary party to sale proceedings for purpose of paying debts of May Barrett Chappelear is without merit.

In pointing out how clearly the Court is the real vendor under the Illinois Statute, the Supreme Court of Illinois in *Ehrgott* v. *Seaborn,* 363 Ill. 292 on 295 (1936) said:

> "The proceedings governing the sale of real estate to pay debts is a purely statutory one. The statute fixes the terms on which the real estate may be sold,

requires the executor or administrator making the sale to file in the office of the clerk of the Court, a complete report of the sale and a general statement of the manner in which the terms of the decree of sale were executed and provides that 'any person interested in the premises sold, and any creditor of the estate may * * * file exceptions to such report, and upon the hearing thereof the court may approve such report and confirm the sale, or disapprove the same and order the premises to be resold'. Ill. State Bar Stat., 1935, Chap. 3, par. 110, p. 61.

"It is obvious from this statutory provision that it was the legislative intent to confer upon the court ordering the sale a very broad power in the supervision of sales made under its order, and as an incident thereto, to approve or disapprove the report of sale as in its judicial discretion it shall deem proper. In harmony with this view it has been established that even though the premises may be declared struck off to the highest bidder, he thereby acquires no interest to or in the property, but his bid, in legal contemplation is a mere offer to buy. (*Farmers and Mechanics Bank* v. *Griffith*, 352 Ill. 323; *Anderson* v. *Anderson*, 338 id. 309) unless the Court confirms the report of sale there is no sale and neither the administrator nor the executor is bound. (*Anderson* v. *Anderson*, *supra*.) *From an application of these principles the rule emerges that the Court is the real vendor* and the executor or administrator is merely its agent for the purpose of procuring offers of sale which the court, acting within its judicial discretion may accept or reject. (*Farmers and Mechanics Bank* v. *Griffith*, *supra*; *Anderson* v. *Anderson*, *supra*.) From the fact that the Court is the vendor the principle may further be evolved that sales of this character by virtue of the Statute, are under the absolute control of the Court ordering the sale and such Court may approve or *of its own motion*, disapprove, any sale as in the exercise of its sound judicial discretion it may deem for the best interest of the parties concerned in the sale."

What was before the Court on August 2, 1938? Delay in confirmation was chargeable to Mark Barrett Cosby, Sr.'s objections to the sale. The only thing before the Court was the question whether the Court's administrative agent had carried out the decree of the Court in accordance with the terms thereof.

(1) Was the sale held as ordered?

(2) Was the sale fairly held?

(3) Was the price bid fair?

The County Court having found affirmatively on these matters found the objections of Mark Barrett Cosby, Sr., were not well taken.

Mark Barrett Cosby, Sr., did not offer to guarantee an equal or better price if a re-sale were ordered.

It was therefore obvious that Mark Barrett Cosby, Sr., would not produce matter to vary the discretionary conclusion of the court and the court had the *power* to confirm the sale.

No case cited by the appellants concerns a proceeding such as this one where *everything* had been *done, and done in accordance with the decree of sale*, and the time for *further objection had expired*, and the only question remaining was the proper administration of the decree, at the time of the death of the heir, Mark Barrett Cosby, Sr.

We have found no authority that such a decree could even be successfully attacked upon direct attack and we do not believe there is any such authority.

The position of the plaintiffs is worth reviewing at this stage in order to demonstrate its complete hollowness.

1. Mark Barrett Cosby, Sr., was the only person who could object to the sale prior to the expiration of time for filing objections.

2. Petitioner had no right to object during all the time allowed for objections because the sole owner (heir) was alive.

3. Mark Barrett Cosby, Sr., could only object upon the grounds that the sale was not in accordance with the decree or the price was not fair, or the sale was not fairly held.

4. Nevertheless the petitioner, who could not have objected at all had he appeared, contends that he can now in a collateral attack object *without any showing that the* sale *was unfair, in fact in spite of overwhelming evidence that it was fair.*

The County Court in Illinois Has Probate Jurisdiction and Jurisdiction of Sales of Real Estate to Pay Debts and Is Entitled to the Same Presumptions in Favor of Its Proceedings as a Court of General Jurisdiction.

The Seventh Circuit Court of Appeals has held in *Montgomery* v. *Equitable Life Assurance Society* (7th CCA, 1936) 83 Fed. 2nd 758, on 760-1 that the County Court of Logan County, Illinois is a court having jurisdiction of sales of real estate to pay debts and in that field is entitled to the same presumptions in favor of its proceedings as are indulged in favor of proceedings of courts of general jurisdiction. The Circuit Court of Appeals said on p. 761:

> "Jurisdiction of the subject matter is the power to decide the general question involved. It is not the exercise of that power. * * * It is the power to decide regardless of whether that decision be right or wrong."

The Court of Appeals further said on page 762:

> "The fact that a Court of general jurisdiction renders a decree, raises a presumption as against col-

lateral attack that it had jurisdiction both as to subject matter and the parties even though the decree contains no recital of notice to the defendants by service of process or otherwise. *Horn* v. *Metzger,* 234 Ill. 240, 84 N. E. 893. See also *Bradley* v. *Drone,* 187 Ill. 175, 58 N. E. 304, 79 Am. State Rep. 214."

Jurisdiction Once Having Attached Could Not Be Lost by Subsequent Irregularity.

This principle is clearly stated in:

Simmons v. *Saul,* 138 U. S. 439 (1890) 34 L. Ed. 1054;

Comstock v. *Crawford,* 3 Wall. 396, 404 (1866) 18 L. Ed. 34;

Kretzinger v. *Brown* (CCA 8th 1908) 165 Fed. 612, 616.

The principle is in fact far stronger than it need be pushed in this case. See *Montgomery* v. *Gilbert* (CCA 9th, 1935) 77 Fed. 2nd 39 and *Kretzinger* v. *Brown* (CCA 8th, 1908) 165 Fed. 612, 615. In the latter case the question as to the effect of failure to give the *prescribed* notice of sale arose. In upholding decrees where notice was not properly given, the Court said p. 616:

"They were passed in the exercise of a jurisdiction which attached when the petition was filed and the necessary parties defendant voluntarily appeared, and *that jurisdiction was not lost or impaired by the failure to give notice of the sale, because it was a mere irregularity in the subsequent proceedings. Simmons* v. *Saul,* 138 U. S. 439, 453, 11 Sup. Ct. 369, 34 L. Ed. 1054; *Grignon's Lessee* v. *Astor,* 2 How. 319, 340, *et seq.,* 11 L. Ed. 283; *Cooper* v. *Reynolds,* 10 Wall. 308, 319, 19 L. Ed. 931; *Mohr* v. *Manierre,* 101 U. S. 417, 25 L. Ed. 1052; *Jackson* v. *MacGruder,* 51 Mo. 55, 58; *Hanks* v. *Neal,* 44 Miss. 212, 226;

Schaale v. *Wasey*, 70 Mich. 414, 420, 38 N. W. 317; *Beidler* v. *Friedell*, 44 Ark. 411, 414; *Cadwaller* v. *Evans*, 1 Disn. (Ohio) 585, 592; *Wyant* v. *Tuthill*, 17 Neb. 495, 23 N. W. 342; *Salisbury* v. *Chadbourne*, 45 Wis. 71, 77. As was said in *Comstock* v. *Crawford*, 3 Wall. 396, 401, 18 L. Ed. 34:

"'When by the presentation of a case within the statute the jurisdiction of a Court has once attached, the regularity or irregularity of subsequent steps can only be questioned in some direct mode prescribed by law. They are not matters for which the decrees of the Court can be collaterally assailed.'"

In the case before us there is no question that jurisdiction attached as to all necessary parties, which in this case was Mark Barrett Cosby, Sr., alone as a defendant and that such jurisdiction remained during execution of the decree on the merits (that a sale should be had) and remained until after all time for objections had expired. The only question that could remain would be whether the Court lost jurisdiction, *not to order sale*, but to *confirm* the sale made in accordance with its decree.

The Illinois Law Is Settled That Death Even Before Judgment on the Merits Does Not Deprive the Court of Jurisdiction and This Principle Is in Accordance With Due Process.

The law of the State of Illinois on the effect of death of a party after suit and before judgment is well summarized by Lindley D. J. in *Streeter* v. *Chicago Title and Trust Co.*, 14 Fed. 2nd 331 on p. 331:

"But the great preponderance of authority is to the effect that, where the court has acquired jurisdiction of the subject matter and the person during the lifetime of a party, a judgment rendered for or against him after his death, although erroneous and liable to be set aside is not void or open to collateral

attack. See Freeman on Judgments, (5th Ed. 1925) Vol. 1, Sec. 406; 33 C. J. 1107; Black on Judgments, Vol. 1, Sec. 200. The rule in Illinois is settled in the case of *Claflin* v. *Dunne,* 129 Ill. 241, 21 N. E. 834, 16 Am. State Rep. 263. There, after the death of one of the defendants, judgment was entered. After expiration of the term the executor of the deceased defendant moved to vacate the judgment. The Court held the judgment voidable but not void saying:

"'The action was commenced while Claflin was alive. He appeared in Court and pleaded to the action. The Court thus had jurisdiction of the subject matter and of the person, and the question arises, whether, after the filing of the plea, the death of Claflin without notice of the death being brought to the attention of the Court, deprived the Court of jurisdiction to render a judgment in the cause. The question is not one free from difficulty, and one, too, upon which the authorities are not harmonious. Freeman on Judgments Sec. 140 says: "If jurisdiction be obtained over the defendant in his lifetime, a judgment rendered against him subsequent to his death is not void."'"

"See to the same effect, cases of *Stoetzell* v. *Fullerton,* 44 Ill. 108; *Danforth* v. *Danforth,* 111 Ill. 236; *Bushnell* v. *Cooper,* 212 Ill. App. 503; *Schaeffer* v. *Potzel,* 238 Ill. App. 335; *Larimer* v. *Snell,* 181 Ill. App. 50; *Gage* v. *Chicago Title & Trust Co.,* 303 Ill. 569, 136 N. E. 483."

"It would seem, therefore, *that there is no question concerning the law in Illinois.* Though the judgment against Streeter, dismissing his suit, was perhaps erroneous, yet it is not void, but merely voidable and remains in force and effect until reversed in proper proceedings. *This being* the rule under the Illinois authorities it must control this Court under the Conformity Act (17 Stat. 196)." (Italics ours.)

It should be pointed out that the Illinois authorities likewise control in the instant case, for the property in question is located in Logan County, Illinois and the proceedings to sell were held in the County Court of Logan County, Illinois.

This same principle is followed in other jurisdictions. See *Yople* v. *Titus,* 41 Pa. St. 195, 80 Am. Sec. 604; *Knott* v. *Taylor,* 99 N. C. 511, 6 S. E. 788; *McCormick* v. *Paddock,* 20 Neb. 486, 30 N. W. 602; *Shea* v. *Shea,* 154 Mo. 599, 55 S. W. 869; *Pugh* v. *McCue,* 86 Va. 475, 10 S. E. 715; *McCampbell* v. *Warrich Corporation,* 109 Fed. 2nd 115, 118 (CCA 7th).

A case exactly in point is *Palmerton* v. *Hoop* (Indiana 1892), 131 Ind. 23, 30 N. E. 874, where the court held that minor heirs could not collaterally attack a judgment confirming a sale where the court had jurisdiction of the administrator at the time of his death. The Court said, 30 N. E. 876:

> "It remains to inquire whether the failure to make the other appellants who are the minor children of Francis M. Palmerton, parties to the proceeding after his death, and before confirmation of the sale, renders the sale as to them void. There is no question made as to the fact that the Court had jurisdiction of Francis M. Palmerton, their father, at the time of his death. *When the land descended to them they took it, therefore, subject to the order previously made by the court to sell it. All that remained to be done was to sell the land, report the sale to the Court, procure its confirmation and execute a deed to the purchaser.* The fact that Francis M. Palmerton died did not deprive the Court of jurisdiction to render a judgment of confirmation. Black, Judgment Sec. 200 says, 'The great preponderance of authority is to the effect that where the court has acquired jurisdiction of the subject matter and the persons, during

> the lifetime of a party, a judgment rendered against him after his death, is although erroneous and liable to be set aside not void nor open to collateral attack.'" (Italics ours.)

The general authorities and texts bear out the rule. *Restatement of the Law of Judgments,* Sec. 78(b), p. 350; 1 *Black on Judgments* (2nd ed.), 294 Sec. 200; 1 *Freeman on Judgments* (5th ed.) 885, Sec. 406.

A Judgment Nunc Pro Tunc Would Have Been Proper.

There is an additional principle of law that where a case is ripe for decision a judgment may be entered *nunc pro tunc.* The entry of such a judgment in this case would *not have been an irregularity.*

In *Bunker* v. *Green,* 48 Ill. 243 (1868) where the plaintiff died before the defendant's motion for new trial was disposed of, the Court said:

> "In the 2nd Volume Tidd's Practice 846, 1st Am. Ed., it is said: 'And if either party die after a special verdict, and pending the time taken for argument or advising thereon, or on motion in arrest of judgment, or for a new trial, judgment may be entered, at common law, after his death, as of the term in which the postea was returnable, or the judgment would otherwise have been given *nunc pro tunc,* that the delay arising from the act of the court may not turn to the prejudice of the party.' This seems to be the long and well settled rule of practice under the common law, and it is not unreasonable or unjust in its application. A party should not be deprived of his rights because the tribunals of justice delay in its administration."

The same principle is clearly announced in *Citizens Securities & Investment Co.* v. *Dennis,* 236 Ill. App. 307, 309, 310, where the Court said:

"In Illinois, as we interpret the authorities the rule is that where one of the parties dies after the appeal has been taken, a judgment *nunc pro tunc* may be entered as of a date prior to the death of the party provided the Court had acquired jurisdiction and rightful authority to render a judgment on that date. *Danforth* v. *Danforth,* 111 Ill. 236, 237; *Seymour* v. *Richardson Fueling Co.,* 205 Ill. 77, 86; *Leonard* v. *Springer,* 174 Ill. App. 516, 523."

Here the case was ripe for decision when it came on for hearing after time for objections expired on July 18, 1938, while Mark Barrett Cosby, Sr., was still alive.

Had the plaintiffs either in 1938 or in 1945 prior to November of that latter year attacked the proceedings in the Logan County Court it could and and should have entered a new judgment *nunc pro tunc* confirming the sale. (See *In re Harvey, guardian of the heirs of Sweet,* 16 Ill. 127, where a sale was confirmed 17 years later).

Even divorce decrees where the matter is ripe for decision are entered *nunc pro tunc.* See 104 A. L. R. Annotation, page 654.

This matter was ripe for decision on July 18, 1938, and the factual situation was such that it would have been an abuse of discretion for the Logan County Court to refuse to confirm the sale.

In *Harvey, guardian of the heirs of Sweet,* 16 Ill. 127, the sale was confirmed 17 years later.

See also: *Mitchell* v. *Overman* (1881), 103 U. S. 62, 26 L. Ed. 369, 370; *Linn* v. *Brecher,* 90 Ill. App. 6, 8; 1 *Black on Judgments* (2nd Ed.) pp. 188-189, Sec. 128; 1 *Freeman on Judgments* (5th Ed.) pp. 226-7, Sec. 123.

How meaningless would be the presumptions in favor of a court having plenary jurisdiction of the subject mat-

ter as shown of this very County Court of Logan County, Illinois (*Montgomery* v. *Equitable Life Assurance Society* (CCA 7th, 1936) 83 Fed. 2nd 758, if we were not to assume the same considerations as to fairness of the sale moved the County Court of Logan County then as moved the District Court in this case (Findings 11 and 16, Pr. Rec. 416 and 417).

How dangerous to contend that established principles of jurisdiction so universally applied, as the foregoing authorities show, are not due process?

The petitioner was afforded an opportunity to be heard by the law of Illinois and was given an actual hearing on original bill. It has been conclusively determined that the sale was fair and, consequently, that he suffered no injury.

Constitutional argument is unavailing where there is no injury. See Re 620 *Church Street Building Corp.*, 299 U. S. 24 on p. 27 headnote 3, (1936) 81 L. Ed. 16 on 19; *Anderson National Bank* v. *Luckett,* 321 U. S. 233 on 242, headnote 7, 1943, 88 L. Ed. 692 on 702, and cases cited.

Petitioner Rights Derivative.

If the petitioner had any rights, they were purely derivative from the one person who had a right to be made a party, and this the District Court (Conclusions 2, 3, 4, 5 Pr. Rec. 418, 419) and the Circuit Court of Appeals (Pr. Rec. 2nd par. last sentence) clearly held.

Point B.

Petitioner declined to avail himself of the opportunity offered by the law of Illinois to reopen the proceedings in the County Court of Logan County, Illinois.

Denk v. *Fiel* (1911), 249 Ill. 424 on 430, points out that a minor in Illinois is given reasonable time after majority to make a direct attack on decrees which he claims have injured him.

This case also holds that this right cannot be exercised to the detriment of a purchaser in good faith relying on a decree.

The situation as to due process here may be briefly stated:

1. No individual can deprive another of property without due process of law. That deprivation must be by a law or by a Court. To be deprived one must have had a right.

2. Mark Barrett Cosby, Jr., had no right to be notified of the proceedings to sell to pay debts in the estate of May Barrett Chappelear wherein Mark Barrett Cosby, Sr., was the only heir.

3. *He had no right to a hearing on whether there should be a sale.*

4. The correctness of the decree of sale is unimpeached and unimpeachable.

5. Had Mark Barrett Cosby, Jr. come in to the County Court of Logan County at any time up to November of 1945 the Law of Illinois and the County Court of Logan County would have given him a full hearing.

6. It would have been a hearing on the *adequacy* and *fairness* of the sale *not* on the question *whether there should be* a sale. That question was determined before he had any rights in the matter.

7. Due process requirements are only that the state judicial machinery offer an "opportunity to be heard".

8. Here in fact Mark Barrett Cosby, Jr. was advised by the pleadings of defendants that he had a full right to reopen the decree of the County Court of Logan County for a year after he filed this suit. (Finding 10, Pr. Rec. p. 420.)

9. Plaintiff here *seeks* under the guise of "due process" *to question a decree he never at any time had a right to question,* the decree for sale.

Point C.

Petitioner has not been deprived of property or other right without due process because he is in exactly the same position as if the motion to dismiss the suit as a collateral attack had never been filed.

Due process was of course accorded by the County Court of Logan County, Illinois as shown in Point A hereof. It has been the settled law of Illinois for many years that a court having jurisdiction of parties could enter a valid judgment after the death of one of the parties. Authorities cited under Point A show this has been the rule approved in other jurisdictions and by the text writers for many years.

The Court has always given the settled procedure in such matters great weight on the question of due process.

> "Not lightly vacated is the verdict of Quiescent years." *Anderson National Bank* v. *Luckett,* 321 U.S. 233 on 244; Headnote 11 (1943), 88 L. Ed. 692 on 702, (and cases cited).

In Point B, we demonstrated that the law of Illinois afforded a method of asserting the rights of a minor who felt injured by decree after reaching majority.

However, here and now petitioner is asserting that he has been denied due process by the District Court of the United States and by the United States Circuit Court of Appeals. Notwithstanding the views of those courts that petitioner sought the wrong remedy, *the defendants' jurisdictional motion was for practical purposes overruled by the District Court.*

Petitioner was in fact given every right which an original bill of equity could give him. The District Court gave him a trial on the merits and found affirmatively and conclusively that he had no basis for complaint.

Since the findings of fact of the District Court are conclusive where there is any evidence to support them respondent does not here review the evidence. (Rule 52, Federal Rules of Civil Procedure as amended by the Supreme Court of the United States, Dec. 27, 1946; *Gaytime Frock Co.* v. *Liberty Mutual Ins. Co.* (7th C.C.A. 1945), 148 Fed. 2nd 696; *Knapp* v. *United States* (7th C.C.A. 1940), 110 Fed. 2nd 420 on 422; *McIntosh* v. *Wiggins* (8th C.C.A. 1941), 1923 Fed. 2nd 316 on 321.)

However to say that the District Court merely found the sale fair, based on an adequate price and not tainted with fraud is a great understatement. *The Court found affirmatively that the purchase was made in good faith.* (Finding 16, Pr. Rec. 417.)

The decree of sale was unassailable, the Court was the vendor, (*Erghott* v. *Seaborn* (1936), 363 Ill. 292, previously quoted at length in this brief) and all that remained for anyone was a right to be heard on whether the sale conformed to the decree and was fair.

However, the District Court of the United States went behind all of these matters and determined positively that

the proceedings were necessary, were regular and produced a good result for the estate. The District Court found affirmatively that there was no fraud and that the defendants purchased in good faith.

Petitioner has therefore had a complete determination by a court of law that there is nothing to his case and that he has been harmed in no way.

It is a hollow contention to claim deprivation of due process because the District Court which heard petitioner's case also told him it would not have had to hear it.

D.

Petitioner's authorities distinguished.

Respondent has read and analyzed all cases cited by petitioner. Respondent believes many of the cases are far afield and that there is not space for complete analysis.

Respondent's summary analysis of those cases is as follows:

A. Cases where there was a failure to include a party who was an actual owner at the *commencement* of the proceedings:

Botsford v. *O'Connor*, 57 Ill. 72 (1870);
Alward v. *Borah*, 381 Ill. 134 (1942);
Heppe v. *Szczepanski*, 209 Ill. 88 (1904);
Leininger v. *Reichle*, 317 Ill. 625 (1925);
Burr v. *Bloemer*, 174 Ill. 638 (1898);
Hedlund v. *Miner*, 395 Ill. 217 (1946);
Phillips v. *Parker*, 148 Kans. 474 (1938);
Elliott v. *Frakes*, 71 Ind. 412 (1880);
Hansen v. *Swartz*, 345 Ill. 609 (1931);

Sutton v. *Read*, 176 Ill. 69 (1898);
Baker v. *Baker*, 284 Ill. 537 (1918);
Walker v. *Cook*, 294 Ill. 294 (1920);
Wright v. *Simpson*, 200 Ill. 56 (1902);
Fischer v. *Banta*, 66 N. Y. 468 (1876);
Swope v. *Swope*, 173 Ala. 157.

B. Cases where a necessary party died prior to presentation of the merits and decree or judgment thereon *e. g.*, death before decree for specific performance or foreclosure:

Welch v. *Louis*, 31 Ill. 446 (1863);
Requa v. *Holmes*, 16 N. Y. 193 (1857);
Hoffman v. *Hanley*, 187 Ill. App. 551 (1914);
Rives v. *Stanford*, 188 Okla. 108 (1940);
Zaegel v. *Kuster*, 51 Wis. 31 (1881);
Sargeant v. *Rowsey*, 89 Mo. 617 (1886);
Kager v. *Vickery*, 61 Kans. 342 (1900);
Hunt v. *Acre*, 28 Ala. 580 (1856).

C. Cases of direct attack upon the decree plus some showing of inadequacy of price or failure to conform to decree of sale or improper advertisement or the like.

Bondurant v. *Bondurant*, 251 Ill. 324 (1911);
Loyd v. *Malone*, 23 Ill. 41 (1859);
Retzinger v. *Retzinger*, 337 Ill. 378 (1929);
Quigley v. *Breckenridge*, 180 Ill. 627 (1899).

D. Cases where there was obviously no privity between parties bound and parties asserting rights such as class suits where the class was not representative, suits where former owner had already parted with title when suit was brought, and the like:

Newberry Library v. *Bd. of Education*, 387 Ill. 85 (1944);

Postal Telegraph Cable Co. v. *Newport*, 247 U.S. 464, 62 L. Ed. 1215 (1918);

Harris v. *Chicago Title and Trust Co.*, 338 Ill. 245 (1940);

Hansberry v. *Lee*, 311 U.S. 32, 85 L. Ed. 22 (1940);

U. S. v. *Walker*, 109 U. S. 258 (1883);

Brown v. *Fletcher's Estate*, 210 U. S. 82 (1908);

People v. *Chicago Lloyds*, 391 Ill. 492 (1945);

Evans v. *Ill. Surety Co.*, 319 Ill. 105 (1925);

Weberpals v. *Jenny*, 300 Ill. 145 (1921).

E. Where jurisdiction was obtained by fraud or collusion or other circumstances making judgment unconscionable:

Indiana Harbor B. R. R. Co. v. *Calumet City*, 391 Ill. 280 (1945);

Eddy v. *Eddy*, 302 Ill. 446 (1922);

Manternach v. *Studt*, 230 Ill. 356 (1907);

Heppe v. *Szczepanski*, 209 Ill. 88 (1904);

Arrowsmith v. *Gleason*, 129 U. S. 86, 32 L. Ed. 630 (1889);

McReynolds v. *Miller*, 372 Ill. 151 (1939);

Denk v. *Fiel*, 249 Ill. 424 (1911);

Pfister v. *Johnson*, 13 Fed. Supp. 662 (N. D. Okla. 1936);

Hewitt v. *Hewitt*, 17 F. (2nd 716 (C.C.A. 9th 1927));

Diamond v. *Connolly*, 251 Fed. 234 (C.C.A. 9th 1918);

Barrow v. *Hunton*, 99 U. S. 80, 25 L. Ed. 407 (1879);

Johnson v. *Waters*, 111 U. S. 640, 28 L. Ed. 547 (1884);

Marshall v. *Holmes*, 141 U. W. 589, 35 L. Ed. 870 (1891);

McDaniel v. *Traylor*, 196 U. S. 415, 49 L. Ed. 533;

Simon v. *Southern Ry.*, 236 U. S. 115, 59 L. Ed. 492;

National Surety Co. of N. Y. v. *State Bank*, 120 Fed. 593;

Nelson v. *Meehan*, 155 Fed. 1;

U. S. v. *Mashunkashey*, 72 Fed. 2nd 847;

C. R. I. & P. R. R. Co. v. *Callicote*, 267 Fed. 799;

Grover v. *Faurot*, 76 Fed. 257.

F. Cases giving details of hearing accorded on question of adequacy of hearing actually provided such as *Windsor* v. *McVeigh*, 93 U. S. 274 (1876) where party was refused right to be heard on the ground that he was a confederate rebel.

Londoner v. *Denver*, 210 U. S. 373 (1908);

Burkett v. *Reliance Bank and Trust Co.*, 367 Ill. 196;

B. & O. R. R. v. *U. S.*, 298 U.S. 349 (1936).

G. *Miscellaneous: LeMoyne* v. *Harding*, 132 Ill. 23 (1890), where sale was ineffective because bidder did not complete purchase within 30 days ordered by the Court; *Anderson* v. *Shepard*, 285 Ill. 544 (1918) concerning unconstitutionality of law requiring administrator to register title; *Armstrong* v. *Obucino*, 300 Ill. 140 (1921) holding proceeding under a repealed mechanic's lien statute a void proceeding; *Baker* v. *Baker*, 284 Ill. 537 (1918), contingent interests should be represented in

partition suit. *Essanay Film Mfg. Co.* v. *Wm. R. Kane,* 258 U. S. 358, 66 L. Ed. 658 that jurisdiction of State Court cannot be questioned in federal court while state suit is pending; *MacArthur* v. *Scott,* 113 U. S. 340, 28 L. Ed. 1015, on general proposition that all necessary parties should be before the court in an equity suit; *Smyth* v. *Ames,* 169 U. S. 466, 42 L. Ed. 819 on reasonableness of utility regulation; *Simon* v. *Craft,* 182 U. S. 427, 45 L. Ed. 1165 (1891) that lunacy trial in absence of defendant may be proper, *Wells Fargo* v. *Taylor,* 254 U. S. 175, 65 L. Ed. 205 (1920) that suit contrary to agreement may be against equity and good conscience; *Hultberg* v. *Anderson,* 252 Ill. 607 on 616 (1912), which firmly holds that to void erroneous judgments would destroy our judicial system; *People* v. *Feicke,* 252 Ill. 414 that service on representative in fiduciary capacity will not bind adverse existing beneficial interest; *People* v. *Russell,* 283 Ill. 520, that a judgment is binding until set aside; *Rabbitt* v. *Weber & Co.,* 297 Ill. 491 that an attachment proceeding is void where affidavit fails to set up the necessary jurisdictional facts.

In *Hopkins* v. *Curtis,* 43 R. I. 19 (1920), also cited by petitioners the court held the decree after death proper as to those parties whose interests had been represented at the hearing on the merits. In *Quigley* v. *Breckenridge,* 180 Ill. 627 (1899), also cited by Petitioners the Supreme Court of Illinois reinstated a sale which had been set aside by the Circuit Court. In *Gibson* v. *Roll,* 27 Ill. 88 (1862) the Supreme Court of Illinois makes it very clear that the method of bringing in parties in a petition of this kind is statutory.

We have reviewed Petitioners' cited cases at length to show that no case is cited where jurisdiction attached to the proper parties in the beginning and the matter

proceeded beyond a hearing on the merits as the record shows was done in the instant case.

Here we reiterate the decree for sale being valid, the only question that could remain for any court at any time would be the conformity of that sale to the decree and its essential fairness, and the District Court found from the evidence that the sale conformed to the decree and was completely fair.

CONCLUSION.

Denial of due process is not fairly involved here.

The County Court of Logan County, Illinois, entered an administrative order approving the sale here involved.

The law of Illinois gave petitioner here a full right to attack that order in that Court. Petitioner declined to avail himself of it.

The District Court of the United States heard petitioner upon all charges made by him, as if it were hearing objections to the sale. It found conclusively that every charge made by petitioner was untrue; that the sale was fairly held, that the land was sold for its fair value, that the purchaser bought in complete good faith in the decree of the Court, bidding against the world.

Upon these findings the court must hold that the sale made should be confirmed, except that it held it had not jurisdiction to review the order of the State Court.

On this state of the case, the contention that the decree of the District Court, and the judgment of the Seventh Circuit Court of Appeals deprived him of due process, the opportunity to be heard, is without basis in reason.

It is plain that he had both opportunity and hearing, and plain that he has suffered no injury.

It is of no small importance that decrees of State Courts following regularly established process resulting in fair sales necessarily made should be decrees that purchasers in good faith can rely upon and that such purchasers should not be deprived of their property arbitrarily or without due process.

Respondents respectfully submit that petitioner has had his day in Court. The petition for further review should be denied.

Respectfully submitted,

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APPENDIX.

The following sections of the Illinois Administration Act are taken from Illinois Revised Statutes State Bar Association Edition 1937, Chapter 3, paragraphs 100 to 111, inclusive, and paragraph 132.

100. Petition—Parties). § 99. The mode of commencing the proceedings for the sale of real estate in such cases shall be by the filing of a petition by the executor or administrator in the circuit or county court of the county where letters testamentary or of administration were issued. The widow, heirs and devisees of the testator or intestate, and the guardians of any such as are minors, and the conservator of such as have conservators, and all persons holding liens against the real estate described in the petition, or any part thereof, or having or claiming any interest therein in possession or otherwise shall be made parties. If there are persons interested in the premises whose names are not known, then they shall be made parties by the name of unknown owners.

101. Form of petition). § 100. The petition shall set forth the facts and circumstances on which the petition is founded, in which shall be stated the amount of claims to be presented, and it shall also contain a statement of the amount of personal estate which has come to the hands of the petitioner, and the manner in which he has disposed of the same, with a statement of the amount of claims paid, a particular description of the real estate sought to be sold, and the nature and extent of all liens

upon said real estate so far as the same may be known to the petitioner. The petition shall be signed by the executor or administrator and verified by his affidavit.

102. Practice). § 101. Such application shall be docketed as other causes, and the petition may be amended, heard or continued for notice or other cause, and the practice in such cases shall be the same as in civil cases. The court may direct the sale of such real estate, disincumbered of all mortgage, judgment or other money liens that are due, and may provide for the satisfaction of all such liens out of the proceeds of the sale, and may also settle and adjust all equities and all questions of priority, between all parties interested therein, and may also investigate and determine all questions of conflicting or controverted titles arising between any of the parties to such proceeding, and may remove clouds from the title to any real estate sought to be sold and invest purchasers with a good and indefeasible title to the premises sold. The court may, with the assent of any mortgagee of the whole or any part of such real estate, whose debt is not due, sell such real estate disincumbered of such mortgage, and provide for the payment of such mortgage out of the proceeds of such sale; and may also, with the assent of the person entitled to an estate in dower, or by the curtesy, or for life or for years, or of homestead to the whole or in part of the premises, who is a party to the suit, sell such real estate with the rest. But such assent shall be in writing and signed by such person and filed in the court wherein the said proceedings are pending. When any such estate is sold, the value thereof shall be ascertained and paid over in gross, or the proper proportion of the funds invested, and the income paid over to the party entitled thereto during the continuance of the estate.

103. Summons.) § 102. Upon the filing of the petition, summons shall be issued, served and returned as in other civil cases.

104. Civil practice act to apply.) § 103. The provisions of the Civil Practice Act, and all existing and future amendments of said Act and modifications thereof, and the rules now or hereafter adopted pursuant to said Act, shall apply to all proceedings hereunder, except as otherwise provided in this Act.

No matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim or otherwise.

105. Notice by publication and mail.) § 104. Whenever any petitioner or his attorney shall file, in the office of the clerk of the court in which his petition is pending, an affidavit showing that any defendant resides or hath gone out of this state, or on due inquiry cannot be found, or is concealed within this state, so that process cannot be served upon him, and stating the place of residence of such defendant, if known, or that, upon diligent inquiry, his place of residence cannot be ascertained, the clerk shall cause publication to be made in some newspaper printed in his county, and if there is no newspaper published in his county, then in the nearest newspaper published in this state, containing notice of the filing of the petition, the names of the parties thereto, the title of the court, and the time and place of the return of summons in the case, and a description of the premises described in the petition; and he shall also, within ten days of the first publication of such notice, send a copy thereof by mail, addressed to such defendant whose place of residence is stated in such affidavit. The certificate of the clerk that he has sent such notice in pursuance of this section shall be evidence.

106. Further notice—Default.) § 105. The notice required in the preceding section may be given at any time after the filing of the petition, and shall be published once in each week for three successive weeks, and no default or proceeding shall be taken against any defendant not served with summons, and not appearing unless the first publication be at least thirty days prior to the day on which such default or proceeding is proposed to be taken.

107. Of persons under disability.) § 106. When it appears that any of the persons required to be made parties defendant, who have been served with summons or notified as aforesaid, are minors, under the age of twenty-one years if males, or eighteen years if females, without a guardian resident in this state, or are persons having conservators, or where such guardian, if any, or conservator, shall not be personally served with summons or shall not appear, the court shall appoint a guardian *ad litem*, who shall appear and defend in behalf of such minors, and be allowed such compensation as may be fixed by the court.

108. Hearing—Decree of sale—Overplus.) § 107. Upon hearing the cause upon the issues formed or taken, the court shall hear and examine the allegations and proofs of the parties and of all other persons interested in the estate who may appear and become parties; and if, upon due examination, the court shall find that the executor or administrator has made a just and true account of the condition of the estate, and that the personal estate of the decedent is not sufficient to pay the debts against such estate, the court shall ascertain, as nearly as can be, the amount of deficiency, and how much of the real estate described in the petition it is necessary to sell to pay such

deficiency, with the expenses of administration then due or to accrue, and make a decree for the sale thereof; Provided, that where any houses and lots, or other real estate, are so situated that a part thereof cannot be sold without manifest prejudice to the heirs, devisees or owner, the court may order the sale of the whole or such part as it may deem best, and the overplus arising from such sale shall be distributed among the heirs and devisees, owners, or such other persons as may be entitled thereto.

109. Conveyances.) § 108. All such sales of real estate shall be made and conveyances executed for the same, by the executor or administrator applying for such order, and shall be valid and effectual against the heirs and devisees of such decedent, and all other persons claiming by, through or under him or them. In case of the death of the executor or administrator applying for an order of sale before conveyance is made, the administrator *de bonis non* shall proceed in the premises and make conveyance in the same manner as if he had originally applied for such order—which conveyance shall be good and valid.

110. Sale—Time of—Notice—Terms—Return.) § 109. No lands or tenements shall be sold by virtue of any such order of the county court, unless such sale is at public vendue, and between the hours of ten o'clock in the forenoon and five o'clock in the afternoon of the same day, nor unless the time, place and terms of holding such sale were previously published for the space of three weeks, by putting up a written or printed notice thereof at the door or a bulletin board of the court house and at four other public places in the county where such real estate shall be sold, and also by causing a similar notice thereof to be published once in each week for three successive weeks prior to the sale, in some newspaper published in such county; or, if there be no such news-

paper, then in such other newspaper in this state, as the court shall direct; nor unless such real estate shall be described with common certainty in such notices. Such executor or administrator may sell the same for not less than one-third cash, and take notes for the balance of the purchase price, payable in not less than six nor more than eighteen months, secured by a mortgage or trust deed, approved by the court, on the premises sold, to secure the payment of the purchase money. It shall be the duty of the executor or administrator making such sale within ten days thereafter, to file in the office of the clerk of said court a complete report of said sale, giving a description of the premises sold, to whom, where, and upon what terms sold, and a general statement of the manner in which the terms of the decree were executed. Any person interested in the premises sold, and any creditor of the estate may, within fifteen days after such sale file exceptions to such report, and upon the hearing thereof the court may approve such report and confirm the sale, or disapprove the same and order the premises to be re-sold.

111. Proceeds of sale.) § 110. When real estate is sold, the moneys arising from such sale shall be received by the executor or administrator applying for the order to sell, and shall be assets in his hands for the payment of debts, and shall be applied in the same manner as assets arising from the sale of personal property.

132. Sale to pay debts—Coerced.) § 130. Whenever real estate is required to be sold, for the payment of debts and costs and expenses of administration, or for the purpose of satisfying a legacy which is a charge upon such real estate, the court may make all necessary orders to coerce the executor or administrator to make immediate application for an order to sell such real estate.